FESE response to the Commission's targeted consultation on the regime applicable to the use of benchmarks administered in a third country

Brussels 12th August 2022

Q1.0. My role in relation with benchmarks is:

☒ Benchmark administrator [please specify organisation's status under BMR]

☐ (i) authorised under Article 34(1)(a) BMR

☐ (ii) registered under Article 34 (1)(b) BMR

☐ (iii) recognised under Article 32 BMR

☐ (iv) endorsed under Article 33 BMR

☐ (v) covered by an equivalence decision adopted by the European Commission under Article 30 BMR

☒ (vi) other [Please specify your organisation's status under BMR]

EU trade association representing both EU and third-country benchmark administrators

☐ Supervised entity using benchmarks (i.e. supervised entities using a benchmark in the sense of the BMR) [multiple options below]

☐ End-user of benchmarks (e.g. investor or business using a benchmark)

☐ Other [please specify your role]

1. Questions specific to benchmark administrators

b) Questions specific to organisations recognised under **(iii)** Article 32 BMR, **(iv)** endorsed under Article 33 BMR, **(v)** covered by an equivalence decision adopted by the European Commission under Article 30 BMR, or **(vi)** other

Q1.1. Is your organisation planning to change its status under BMR in light of the entry into application of the rules for third country benchmarks as they currently stand?

☐ Yes

☐ No

☐ Don't know / no opinion / not applicable

Please explain your answer to question 1.1: *[2000 character(s) maximum]*

Q1.2. How significant is the provision of benchmarks in the EU, as a proportion of your revenue derived from the provision of benchmarks worldwide?

☐ 0-20 %

☐ 21-40 %

☐ 41-60%

☐ 61-80 %

☐ 81-100 %

☐ Prefer not to say

☐ Do not know/no opinion/not applicable

Please explain your answer to question 1.2: *[2000 character(s) maximum]*

Q1.3. To the extent possible, provide the aggregate notional amounts / values (unit: EUR 1 000) (or an estimate thereof) for the use of your organisation's third country benchmarks in the Union in each of the following settings. If the breakdown is not available, please provide the total value:

	Foreign exchange	Interest rate	Equity commodity	Other (please specify)	Total
Issuance of a financial instrument which references an index or a combination of indices					
Determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices					
Being a party to a financial contract which references an index or a combination of indices					
Providing a borrowing rate as defined in point (j) of Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party					
Measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees					
Other (please specify)					
Total					

Q1.4. Please provide a list of all your benchmarks or family of benchmarks for which you are aware that they are used by EU supervised entities. Alternatively, please provide the number of such benchmarks: *[2000 character(s) maximum]*

Q1.5. [for respondents (vi)] Have overall compliance costs – including additional one-off and ongoing supervisory/registration fees incurred in the EU – acted as a deterrent for you to seek (or not to seek) compliance with the BMR, or slowed down the process towards compliance with the current third country regime?

☐ No, compliance costs (including supervisory/registration fees) did not influence our decision to seek (or not to seek) compliance with the BMR third country regime.

☐ Yes, compliance costs (including supervisory/registration fees) have slowed down our decision to seek compliance with the BMR third country regime.

☐ Yes, compliance costs (including supervisory/registration fees) have forced us to renounce to our project to seek compliance with the BMR third country regime.

☐ Don't know / no opinion / not applicable

Please explain your answer to question 1.5, distinguishing if relevant operational/organisational costs and financial costs such as supervisory/registration fees: *[2000 character(s) maximum]*

Q1.6. [for respondents (vi)] If you have already started taking measures to seek compliance with the current third country regime, anticipating its application as of 31 December 2023, please provide an estimation of the costs incurred by such measures: *[2000 character(s) maximum]*

2. Questions to all types of respondents

Q2.1. Do you believe that the rules applicable to the use of benchmarks administered in a third country, which will fully enter into application as of January 2024, are fit-for-purpose? If not, how would you propose to amend the BMR's third country regime?

☐ Those rules are appropriate

☒ Those rules are overall appropriate, but minor adjustments are needed

☐ Those rules are not fit-for-purpose, and should be reviewed

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.1: *[2000 character(s) maximum]*

We consider that the current regulatory approach has been in place for a relatively short period of time but has ensured a uniform standard in the EU, which is key for investor protection. However, we understand the concerns about the burden on benchmarks administrators to comply with the BMR.

In this context, FESE recommends that a comprehensive assessment is conducted on the suggested and possible regulatory changes. In particular, the concept of a 'strategic' benchmark requires further clarification (see answer to Q2.2). To allow for a smooth transition and to consider any appropriate changes following the aforementioned

assessment, FESE supports an extension of the third country regime transition period to end-2025.

Considering the global nature of the benchmark business, an assessment should consider the impact on EU benchmark administrators and investors of third country administrators being subject to requirements that are not equivalent. The assessment should also explore the current BMR regime on its proportionality, aiming to alleviate burdens for benchmark administrators. Last, the assessment should study ways to broaden the accessibility of benchmarks for EU customers.

Should any changes be considered by the Commission, the following elements should in our view underpin any policy change:

(i) Any change in the regime should apply to both EU and non-EU administrators, irrespective if they offer a strategic benchmark or choose to make use of an opt-in possibility.

(ii) Reliance on the recognition or endorsement of administrators in equivalent third countries could bring some efficiencies.

Q2.2. More specifically, would you be in favour of a framework under which only certain third country benchmarks, deemed 'strategic', would remain subject to restrictions of use similar to the current rules? Under this hypothesis, the use by EU supervised entities of all other third country benchmarks than those 'strategic' benchmarks would be in principle free, without any additional requirement attached to the status of the administrator.

☐ Totally opposed

☐ Somewhat opposed

☒ Neither opposed nor in favour

☐ Somewhat in favour

☐ Totally in favour

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.2: *[2000 character(s) maximum]*

In order to assess the consequences of its introduction, the definition of the term 'strategic' benchmark and the resulting framework need to be further clarified. As a general condition, as stated in Q2.1, FESE considers it essential that any proposed framework not risk the level playing field, hence any de-scoping of the BMR to 'strategic benchmarks' should apply to both EU and third country administrators.

In addition, while awaiting further clarification, we would like to highlight other additional recommended pre-conditions: i) the definition of 'strategic' benchmark should be based on clear, reasonable, objective and risk-based criteria, rather than on qualitative factors; ii) these criteria should ideally be the same as those for designating 'critical' benchmarks, but the criteria set out in response to Q2.3 could also be taken into account; iii) if the classification was the basis for supervision, a clear definition is necessary to allow administrators to foresee how a benchmark will be classified; iv) the transition between 'non-strategic' and 'strategic' would result in a regulatory threshold for administrators and sufficient time would need to be granted for them to meet the additional requirements; v) strategic benchmarks offered from third countries should comply with requirements following from the existing category of significant benchmarks; and vi) to ensure that EU customers are able to make use of all benchmarks which are no longer in scope of the BMR, Art. 29 on 'use of a benchmark' would also need to be amended, limiting the requirement to register benchmarks to 'strategic' benchmarks only.

Q2.3. Under the hypothesis set out in the question above, there would need to be criteria to determine whether a third country benchmark should be designated as 'strategic'. Which of the following criteria should be used, in your view, to identify 'strategic' third country benchmarks?

Criterion	Totally against	Somewhat against	Neither against nor in favour	Somewhat in favour	Totally in favour	Don't know - No opinion - Not applicable
Notional amount/values of assets referencing the benchmark globally		X				
Notional amount/values of assets referencing the benchmark in the EU			X			
Type of use (determination of the amount payable under a financial instrument, providing a borrowing rate, measuring the performance of an investment fund…)		X				
Type of user (investment fund, credit institution, CCP, trade repository, etc.)	X					
Core activity of the administrator (bank, trading venue, asset manager, benchmark administrator, etc.)	X					
Regulatory status of administrator in home jurisdiction	X					
Type of benchmark (interest rate benchmark, commodity benchmark, equity benchmark, regulated-data benchmark, etc.)			X			
Substitutability of the benchmark (i.e. existence of a similar benchmark administered in the EU)			X			
EU benchmark labels (including EU Paris			X			

Aligned Benchmarks and EU Climate Transition Benchmarks)						
Other						

Please specify to what other criterion you refer in your answer to question 2.3: *[2000 character(s) maximum]*

Please explain your answer to question 2.3: *[2000 character(s) maximum]*

As a general remark, we consider that the current regulatory approach has been in place for a relatively short period of time but has ensured a uniform standard in the EU, which is key for investor protection. However, we understand the concerns about the burden on benchmarks administrators to comply with the BMR.

FESE considers that the criteria for the designation of 'strategic' benchmarks, and their measurement, must be clearly defined in order to ensure a level playing field. Besides, should any change in the regime be introduced in this regard, it should apply to both EU and non-EU administrators.

In assessing the appropriateness of the above criteria, FESE considers that the focus of the criteria is solely on what makes a benchmark 'strategic', but the general definition of what constitutes a benchmark would stay unchanged. That being said, FESE believes that the vulnerability of the methodology used to calculate a benchmark should be an important factor when determining whether a benchmark is classified as 'strategic'. The systemic relevance of a benchmark should also be taken into consideration.

Q2.4. Under the hypothesis where the current third country regime would be reformed or repealed, please indicate the degree to which you agree with each of the following statements:

a) The European Commission should be granted powers to designate certain administrators or benchmarks as 'strategic' on a case-by-case basis.

☐ Do not agree at all

☐ Do not agree

☐ Neither agree nor disagree

☒ Somewhat agree

☐ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 a): *[2000 character(s) maximum]*

FESE considers that, if the classification is to be the basis for supervision, a clear definition of a 'strategic' benchmark based on objective criteria is essential. In other words, the decision to designate certain benchmarks as 'strategic' should be taken by the Commission based on objective criteria, which are publicly available. This would be key to providing clarity to the market, allowing administrators to anticipate how a benchmark will be classified.

b) ESMA should be given the task to supervise those third country 'strategic' benchmarks.

☐ Do not agree at all

☐ Do not agree

☐ Neither agree nor disagree

☒ Somewhat agree

☐ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 b): *[2000 character(s) maximum]*

As already indicated in Q2.2, further clarification of the definition of the 'strategic' benchmark and the resulting framework is needed to properly assess the implications of its introduction and thus provide a well-considered response. In this context, and as indicated in Q2.4a), if classification is to be the basis for supervision, a clear definition based on objective criteria – in line with response Q2.3 – would be necessary.

Pending resolution of the above remarks, and until an equivalence decision has been made for a third country, FESE agrees with the Commission that it would make sense for ESMA to supervise 'strategic' benchmarks offered by third country administrators. In this scenario, it is important to clarify that both EU-based and third country non-strategic benchmarks are no longer subject to supervision in order to ensure a level playing field. Otherwise, the respective benchmark administrators would be supervised by both ESMA and an NCA, and this dual regulation would be inappropriate.

In addition, it would be important to address the potential administrative bottleneck that may arise as a result of this supervision.

c) ESMA should also be tasked with the supervision of EU-based benchmarks that qualify as 'strategic'.

☐ Do not agree at all

☐ Do not agree

☒ Neither agree nor disagree

☐ Somewhat agree

☐ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 c): *[2000 character(s) maximum]*

As already indicated in Q2.2, further clarification of the definition of the 'strategic' benchmark and the resulting framework is needed to properly assess the implications of its introduction and thus provide a well-considered response. In this context, and as indicated in Q2.4a), if classification is to be the basis for supervision, a clear definition based on objective criteria – in line with response Q2.3 – would be necessary.

Pending resolution of the above remarks, FESE agrees with the Commission that it would make sense for ESMA to supervise 'strategic' benchmarks offered by third country administrators. In this scenario, it is important to clarify that both EU-based and third country non-strategic benchmarks are no longer subject to supervision in order to ensure a level playing field. Otherwise, the respective benchmark administrators would be supervised by both ESMA and an NCA, and this dual regulation would be inappropriate.

d) The EU internal scope of regulation of EU benchmarks should also be amended along similar lines, to only comprise certain types of strategic benchmarks, notably with a view to avoid circumvention or unlevel playing field.

☐ Do not agree at all

☐ Do not agree

☐ Neither agree nor disagree

☐ Somewhat agree

☒ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 d): *[2000 character(s) maximum]*

As reflected in the response to Q2.1, we would support a comprehensive assessment of the suggested proposals before implementing them, including the descoping of certain administrators or benchmarks, whether EU-based or in third countries. Nevertheless, if the scope of the regulation was to be reduced for third-country benchmarks, the same approach should follow in the EU to achieve an equal treatment.

e) The EU BMR could function as an opt-in regime, whereby both EU administrators and third-country administrators would benefit from a form of quality label attached to the BMR as they voluntarily decide to comply with the EU BMR and being subject to supervision. Under this hypothesis, the opt-in regime would be applicable to most benchmarks, while only certain benchmarks (e.g. above-mentioned 'strategic' benchmarks) would be subject to mandatory compliance with the EU BMR and supervision.

☐ Do not agree at all

☐ Do not agree

☒ Neither agree nor disagree

☐ Somewhat agree

☐ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 e): *[2000 character(s) maximum]*

In order to properly assess the appropriateness of such a regime, FESE believes that it would first be necessary to provide more clarity on the definitions and frameworks for both those benchmarks and use cases (including 'strategic' benchmarks) for which compliance with the BMR would be mandatory, and those under the opt-in regime.

f) EU benchmark labels (including EU Paris Aligned Benchmarks and EU Climate Transition Benchmarks) should not be accessible to third country administrators, and only be accessible to administrators supervised in the EU and subject to the BMR.

☒ Do not agree at all

☐ Do not agree

☐ Neither agree nor disagree

☐ Somewhat agree

☐ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 f): *[2000 character(s) maximum]*

FESE strongly disagrees with limiting the international usage of EU ESG benchmark labels. It is in the best interest of the EU and EU investors to allow third country administrators to use EU ESG labels for their benchmarks when they meet all relevant requirements.

The suggested measure would exclude some of the largest global index providers from using ESG labels, particularly in the area of fixed-income ESG benchmarks. The exclusion of third country administrators would limit the depth of choices for EU investors and risks exacerbating existing problems with the BMR third country regime, including the unwillingness of certain third country administrators to become recognised or endorsed thus allowing EU customers to continue using their benchmarks in the absence of a transitional period. EU investors rely on ESG benchmarks offered from third countries and are increasingly expected to use benchmarks labelled as ESG under the BMR.

If EU investors are unable to make use of third country ESG benchmarks, they would be required to make use of potentially less suitable or innovative benchmarks for their investments, or they may decide not to invest at all. This latter consequence would potentially limit capital flows towards ESG investments and thereby be counterproductive in the EU's effort to reach its sustainable finance goals.

Such restrictions could also be interpreted as protectionist, as they would thwart international competition and potentially diminish the global appeal and standing of the EU ESG labels for benchmarks and its broader sustainable finance rules.

Besides, this approach would frustrate the expectations of third-country administrators who have made significant investments to become BMR-compliant and have a regulatory status comparable to that of EU administrators.

If EU benchmark labels were to remain accessible to third country administrators (which are not subject to EU supervision), and if the labelled benchmarks have not been designated as "strategic", some safeguards should be put in place to maintain the reliability of those labels. Those safeguards should ensure that benchmarks administered in a third country and using an EU label effectively comply, on a continuous basis, with the relevant minimum standards attached to those labels. Regarding such benchmarks administered in a third country and using an EU label:

g) An EU administrator subject to EU supervision should be responsible for compliance of the third country labelled benchmark with the relevant standards (under a mechanism similar to the current endorsement framework).

☐ Do not agree at all

☐ Do not agree

☒ Neither agree nor disagree

☐ Somewhat agree

☐ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 g): *[2000 character(s) maximum]*

FESE agrees that an EU administrator should be responsible for compliance of the third country labelled benchmark (if deemed strategic under the proposed new benchmark rules) under a mechanism similar to the current endorsement framework.

h) They should be directly supervised by ESMA (under a mechanism similar to the current recognition framework).

☐ Do not agree at all

☐ Do not agree

☐ Neither agree nor disagree

☐ Somewhat agree

☐ Fully agree

☒ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 h): *[2000 character(s) maximum]*

EU-designed ESG labels currently under the scope of the BMR should be accessible for third country administrators, as long as they comply with the ESG label BMR requirements.

i) EU benchmark users should be required to only use benchmarks that comply with the EU standards on a continuous basis. As a consequence, those users should be required to gather the necessary information to verify that the benchmark's methodology is consistent (on a continuous basis) with the EU standards, and for ceasing use of those benchmarks in case the labels are misused.

☐ Do not agree at all

☐ Do not agree

☒ Neither agree nor disagree

☐ Somewhat agree

☐ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.4 i): *[2000 character(s) maximum]*

It is essential for the safety and integrity of financial markets that EU benchmarks users only use benchmarks that comply with EU standards on an ongoing basis. However, a slightly different question is how to verify such compliance, as we do not believe that all users of benchmarks have the necessary skills and experience to perform this assessment. As a consequence, the proposed requirement risks, in practice, limiting the benchmarks available to EU customers.

With Regulation 2019/2089, the EU recently introduced a number of sustainability-related disclosures to benchmark administrators, especially for those benchmarks advertising ESG features. As mentioned in its renewed sustainable finance strategy, the Commission is exploring the possibility to create an EU ESG benchmark label, whose scope would simultaneously encompass environmental, social and governance pillars. This label would be an addition to the already existing climate-focused PAB and CTB labels, and would aim at bringing more clarity in the market for ESG benchmarks and further tackling "ESG-washing".

Q2.5. Do you believe that creating an EU ESG benchmark label would help enhance the quality of ESG benchmarks?

Would a context where a significant share of those benchmarks are administered in a third country influence your appraisal?

☐ Do not agree at all

☐ Do not agree

☒ Neither agree nor disagree

☐ Somewhat agree

☐ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.5: *[2000 character(s) maximum]*

In case an EU ESG benchmark label is created, it would be beneficial for everyone involved, if the minimum requirements and methodology of such a label were aligned with SFDR and MiFID (e.g. to ensure consistent input for ESG disclosures).

Q2.6. Should such an EU ESG benchmark label be created, should this label be accessible to third country administrators?

☐ Do not agree at all

☐ Do not agree

☐ Neither agree nor disagree

☐ Somewhat agree

☒ Fully agree

☐ Don't know / no opinion / not applicable

Please explain your answer to question 2.6: *[2000 character(s) maximum]*

We fully agree with the Commission that any EU-designed ESG label currently under the scope of the BMR should be accessible for third country administrators, as long they comply with the ESG label BMR requirements.

Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) below. Please make sure you do not include any personal data in the file you upload if you want to remain anonymous.

Additional FESE considerations While the current consultation focuses mainly on the BMR third-country regime, FESE Members would like to take the opportunity to underline that there are still a number of issues encountered in the implementation of BMR that should be addressed as soon as possible. **1. Non-significant benchmarks** BMR categorises benchmarks as critical, significant or non-significant, based on the value of instruments, contracts and or funds referencing them. FESE considers that the regulatory framework applying to non-significant benchmarks is not proportional and that most of the governance and control requirements would not have to be applied to these benchmarks. A review of the regime is required not only in terms of more proportionate governance requirements but first and foremost with a view to revise the calibration criteria and thresholds themselves as well as the technical preconditions required for the proper

classification of benchmarks. FESE therefore supports an open-ended assessment of the regime which may lead to different conclusions/options on how to proceed, with special emphasis on the need for proportionality on non-significant benchmarks as these are less prone to manipulation. We encourage the Commission to observe the regulatory regime for these benchmarks remaining attentive of their usage and implications for both users and for administrators in terms of compliance with requirements.

2. Transparency of methodology and benchmark statements

2.1 Transparency of methodology

BMR includes detailed requirements regarding transparency of methodology and these requirements have been further strengthened by the Climate Benchmarks Regulation. However, some stakeholders are calling for further disclosure requirements. In this context, it is important to consider that disclosures need to be well-suited to the respective target groups, whether it is information to be made public or to be provided to customers of benchmark providers. While benchmark providers are already very transparent and publicly disclose their methodologies - including information on the respective third-party data sources - certain proprietary data are usually disclosed only to customers with whom administrators have contractual arrangements. However, data owned by third parties, such as data vendors and research providers, may usually not be disclosed at all.

2.2 Benchmarks statements

Further disclosure requirements are included in the provisions governing benchmarks statements. These are not very useful and there are overlapping requirements between information that should be included in the benchmarks statement and the provisions related to transparency of methodology. We consider that the requirement to publish a benchmark statement should be removed as the information is already available via other means. To clarify, in relation to the new ESG requirements introduced by the Climate Benchmark, FESE fully supports these. However, rather than these provisions referring to benchmark statements, we consider that the requirements could be included in the overall provisions regarding transparency of methodology.

3. Definitions and data clarification

FESE members have encountered some issues in relation to the application of the BMR definitions. These are outlined below.

3.1 Definition of “index”

There is a lack of clarity regarding the definition which we think has led to indices originally not intended to be in scope becoming regulated. ‘Made available to the public’ could benefit from more guidance. Alternatively, the definition could be narrowed down, e.g. to refer to indices that are in widespread use within financial instruments/contracts.

3.2 Definition of “financial instrument”

The definition is drafted very widely. This has caused significant challenges in identifying with certainty what instruments are within scope of the BMR. In particular, the SI component of the financial instrument definition seems unintentionally to have brought within scope certain OTC derivatives. This does not seem consistent with recital 9 of BMR. Determination of in-scope SI use is further hampered by the lack of a comprehensive SI register data (in particular in relation to commodity-related instruments). On this basis, it would be appropriate to remove the reference to “via an SI” from the scope of the BMR “financial instrument” definition.

3.3 Availability of data on exposure towards benchmarks

It would be useful to receive clarification regarding whether BMR is intended to apply to supervised entities when transacting with non-EU counterparties or being used by an investment fund that is distributed solely outside the EU. Financial products and the associated trading venues or systematic internalisers are listed in FIRDS and are in scope of the BMR. It would be beneficial if those trading venues and systematic internalisers could be incentivised to be transparent about exposure towards benchmarks and make the information about the volume, notional and open interest available to the benchmark provider. An example is traded derivatives contracts on reference rates (swaps). These are of high interest due to the LIBOR transition.

4. Third country FX spot rates

FESE would support sensible legislation which allows the use of FX spot rates for not fully convertible currencies as reference rates for non-deliverable forward contracts.

5. Commodity benchmarks

FESE does not consider that current conditions for commodity benchmarks are appropriate. There is a lack of clarity between provisions for regulated data benchmarks and commodity benchmarks and how these overlap for benchmarks that fit into both frameworks. FESE would, therefore, see benefits in clarifying the applicable provisions. There should also be a proportionate approach to regulate commodity benchmarks that fall under Annex II, taking into account the size of the benchmarks and the data sources. The calibration of thresholds for commodity benchmarks should also be re-considered.